No. 20104

United States
COURT OF APPEALS
for the Ninth Circuit

TILLAMOOK CHEESE & DAIRY ASSOCIATION,

Plaintiff-Appellant,

v.

TILLAMOOK COUNTY CREAMERY ASSOCIATION, H. S. DIXON, GAYLORD P. SHIVELY, JOHN S. CRAVEN, JR., OTTO SCHILD and WARREN A. McMINIMEE,

Defendants-Appellees.

APPELLANT'S REPLY BRIEF

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

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PRELIMINARY STATEMENT

Appellant in its opening brief points out the law as applied to the record—the *whole* record, which appellant submits requires reversal of the summary judgments.

Appellant's opening brief stands unchallenged. Appellees' brief states no legal proposition or authority prompting the slightest change or shift in emphasis in appellant's argument here.

If there is but one conclusion to be drawn from reading appellees' brief and then re-reading appellant's opening brief, it is that there is not only one but there are many genuine issues of fact in dispute; these issues are unresolved by the test of trial—making plain the error of the trial court in allowing the summary judgments.

We note appellees' statement of the "Positions of the Parties" (Br. 5)[1] with some amazement.

Appellees argue the case was ripe for summary judgment; appellant firmly disagrees. Appellees ignore the record. Appellant *did* produce support for its allegations of conspiracy and attempted monopolization, which were far from "naked and conclusionary" (See R. 380-389). The allegations of the second amended complaint do not deserve appellees' characterization—"naked and conclusionary" (Br. 5). Let appellees be reminded that the trial court accepted the sufficiency of appellant's claim of attempted monopolization in denying summary judgment as to that claim. The only point which prompted the trial court, mistakenly we submit, to grant summary judgment as to the conspiracy portion of appellant's claim was the court's assumption that a third party, an "outsider" to the cooperative family, was required to be a part of the alleged conspiracy, taking the case past the hurdle thought to be posed by the so-called *Sunkist*[2] doc-

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[1] As used in this brief, "Op. Br." refers to appellant's opening brief; "Br." refers to appellees' brief; "R." refers to the Clerk's record; and "Tr." refers to the Reporter's Transcript.

[2] *Sunkist Growers, et al.* v. *Winckler & Smith Citrus Products Co., et al.,* (1962) 370 U.S. 19, 8 L. Ed. 2d 305, reh. den., 370 U.S. 965, 8 L. Ed. 2d 834.

trine, and the court's failure to recognize the presence of an "outsider."

The court stated at one point: "We are still on our same course as to find out whether McMinimee or Cadonau [Alpenrose Dairy, Inc.] or both of them are that type of a separate and distinct legal entity from the co-op. If they are, then they would be capable of entering into a conspiracy with the co-op and would fall outside of the protection that is delineated in *Sunkist.*" (Tr. 224)

Appellant is convinced and appellees admit[3] that Alpenrose Dairy, Inc. is a "separate and distinct legal entity from the co-op"; it is, therefore, capable of entering into a conspiracy with the co-op, consistent with the rationale of the *Sunkist* case.

Appellant in its opening brief has attempted to show that once this separate legal entity is established and, indeed, admitted, summary judgment is wholly inappropriate in the case at bar.

Appellant was precluded from any general pretrial discovery; discovery was limited by the trial court to establishing that Alpenrose Dairy, Inc. and Warren McMinimee were separate and distinct from the cooperative defendants—appellees. Therefore, it is incorrect to state that appellant has failed to produce any support for its allegations. Appellant's contentions about matters of fact clearly in dispute are set forth in the opening brief (Op. Br. 10-17). Appellees misstate appellant's position (Br. 5):

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[3] "Alpenrose Dairy meets the threshold requirement of being an independent person, separate from TCCA." (Br. 9)

> "Appellant's position, in essence, is that summary judgment is inappropriate in an antitrust suit, and that by alleging antitrust violations in the language of the statute, which violations are denied by appellees, a genuine issue of material fact exists."

This contention finds no support in appellant's opening brief nor in the record or transcript in this case. What we do say is that "special exigencies of antitrust litigation are recognized by the Supreme Court as limiting advisability of summary judgment in antitrust cases" (Op. Br. 26). We say not only that "a genuine issue of material fact exists" but, indeed, that many such issues exist. It may be true that appellant's complaint alleges antitrust violations in the language of the statute, but appellant has gone much further than *merely* alleging these violations in the language of the statute (R. 380-389, and also R. 330-375). The only thing to which a characterization of "naked and conclusionary" could be applied in this entire record are the denials of complicity in violations of the antitrust laws by some of the defendants and alleged co-conspirators (R. 110, 113, 117).

Such denials are not proof; they sharpen the issues which demand resolution by trial.

Appellees argue that this appeal presents two questions:

> "1. Is not summary judgment dismissal of a conspiracy charge in an antitrust suit against an agricultural cooperative and its agents correct where plaintiff has been afforded every opportunity but has failed to show any 'outside party' as participating in the alleged conspiracy?" (Br. 5)

This is not the question presented by this appeal. The question rather is as stated in appellant's opening brief (Op. Br. 18-20); if we were to rephrase the question posed by appellees, based on the record and the transcript rather than wishful thinking, we could ask:

> Is summary judgment with respect to a conspiracy charge in an antitrust suit against an agricultural cooperative and its agents correct where plaintiff has shown that an admittedly capable co-conspirator (Alpenrose Dairy, Inc.) is claimed to have participated in the alleged conspiracy (although denied by the alleged co-conspirator) when an attempted monopolization charge based on the same facts, but absent the legal requirement of an "outside party," is ordered to go to trial for resolution of genuine issues of material facts?[4]

We think it clear that a plaintiff need not prove an alleged conspiracy before trial; it merely has to show that a bona fide claim or contention is made that an admittedly "outside party" has participated to a greater or lesser extent in the alleged conspiracy. No pretrial discovery was undertaken with respect to the substantive charges of the conspiracy. Discovery was strictly limited to determining if the claimed co-conspirators were separate and apart from the co-op, TCCA (Tr. 205, 296, 211).

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[4] That essentially the same facts support charges of violation of both Section 1 and Section 2 of the Sherman Act is an accepted standard familiar to the antitrust bar:

> "The antitrust indictment or complaint with which we are all familiar is one that charges a violation of both sections and in doing so usually relies upon essentially the same set of facts to support both charges." Hugh B. Cox, Esq., of Covington & Burling, in his paper to the Spring Meeting of the Section of Antitrust Law, A.B.A., in Washington D. C., April 8, 1965 (27 A.B.A. Antitrust Section 72).

The second question presented by appellees' brief (Br. 6) finds no basis in law; its premise is a non-sequitur. If we assume that Alpenrose Dairy, Inc. is a separate and distinct legal entity, as is admitted by appellees (Br. 9, R. 398), then the only question to be answered (Op. Br. 19) is whether the mere fact that a defendant is a lawyer relieves him from the obligation to abide by the antitrust laws of this country. That Mr. McMinimee may have been more than merely the lawyer for the other appellees appeared to be recognized by the trial court's comment before Mr. McMinimee's examination on deposition and in limiting the scope of that deposition:

> "So I am not interested in going into any transactions between Mr. McMinimee and the defendant, because I am willing to accept that they are in bed together and they own each other and one is the alter ego of the other. Now, let's find out in what entity he represents that puts him in the category of being a legal entity to join as a conspirator with one or more of the defendants" (Tr. 231).

Appellees' summary of argument and argument (Br. 6-22) ignore most of the record and transcript. To say, for example, that "the relationship between Alpenrose and TCCA was fully developed in the Cadonau and Dixon affidavits and by Mr. Cadonau's testimony" (Br. 9) stands like an Alice-in-Wonderland-proposition, in view of the whole record.

Appellees ask the Court to accept as the gospel truth the self-serving declarations and affidavits of their partisans (Br. 9-10): the affidavits of Cadonau and Dixon

(R. 110, 113) and Cadonau's testimony (Tr. 268-307). To the extent that contentions are made by the appellant's witnesses, these are characterized as "vague opinions and conclusions." These, however, were sufficient to compel the trial judge to deny summary judgment sought by appellees with respect to the monopolization charge.

In short, appellees' argument is really no answer to the opening brief which asks the summary judgments be reversed based on the whole record and the applicable law.

ARGUMENT

I. Summary judgment was error with respect to the conspiracy charges against appellees.

The authorities cited by appellees in their brief do not support their contention that summary judgment is proper on the basis of the record in this case. This particular part of appellees' argument (Br. 7-12) cites only one case, the *Sunkist*[5] case, as authority for the trial court's opinion of August 6, 1964 (R. 85) with respect to the original complaint (R. 1), not the second amended complaint (R. 380). Appellees did not even attempt to answer the numerous authorities cited by appellant, or take issue with appellant's detailed discussion of the *Sunkist* case (Op. Br. 3, 21, 22, 27, 29, 37, 39).[6]

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[5] Note 2, p. 2 supra.

[6] These page references to the opening brief refer to the pages in the opening brief where the *Sunkist* case was cited or discussed by appellant.

Appellees' argument that ". . . Mr. McMinimee and Alpenrose Dairy are not now, and never have been, involved in any violations of the antitrust laws, and are not capable co-conspirators" ignores much of the record,[7] and also it is an inappropriate statement in terms of the legal premise in the case of a summary judgment question.

We make the latter point because appellant did not need to show that an "outside person" did in fact conspire to violate the antitrust laws; all we had to show was that we have a *prima facie* case of a conspiracy, not necessarily *to* violate the antitrust laws, but which conspiracy would have effected a violation of the antitrust laws. Once a *prima facie* claim is established, by verified complaint, affidavits and testimony, then denied by the accused appellees and their friends, such as Alpenrose Dairy, Inc., a genuine issue of fact exists and a trial rather than a summary disposition is indicated.

The presence of a capable "outside person" is admitted, as we pointed out before (Br. 9).[8]

Appellant submits, as we argued in our opening brief,

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[7] R. 308, Br. 9.

[8] At R. 398 appellees state, in a legal memorandum submitted to the trial court ". . . there is no question that Alpenrose Dairy, Inc. is distinct from and not part of the TCCA organization. The sole question, therefore, is whether Alpenrose Dairy, acting by and through Carl H. Cadonau, was, *as far as plaintiff is concerned,* anything more than a mere customer of TCCA." (Emphasis supplied). Appellees pose the question much more candidly and correctly in their memorandum to the trial court than anywhere in their brief to this court.

". . . as far as plaintiff is concerned" Alpenrose Dairy, acting by and through Carl H. Cadonau, was indeed "more than a mere customer of TCCA"; it is an alleged co-conspirator.

that summary judgment as to the conspiracy charge was error, applying the relevant authority to the record in this case.

II. Summary judgment was error regarding appellant's claims with respect to Warren McMinimee.

Appellees' argument on this point is brief. Beyond this, it has no merit. No authorities are cited by appellees in support of their argument that summary judgment in their view was proper with respect to defendant Mr. McMinimee (Br. 13). We assume they found none. No attempt is made to respond to the argument of appellant (Op. Br. 33-55) and to authorities cited by us in support thereof,[9] with the sole exception of the *Poller* case, and that in another part of their brief (Br. 17-21).

III. Summary judgment was error and particularly inappropriate in this case.

Appellees argue that summary judgment is particularly appropriate in the present case, from Page 13 through Page 22 of their brief. This is the only part of the brief where any judicial authority is cited other than the *Sunkist* case. There is practically no pretense of relating the authorities and the argument to the record.

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[9] Op. Br. 33-35: *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc.* (S.D. N.Y. 1956) 146 F. Supp. 300 [appeal dismissed on other grounds, 243 F.2d 795], 1956 C.C.H. Trade Cases, Para. 65,531; *Poller* v. *Columbia Broadcasting System,* (1962) 368 U.S. 464, 7 L. Ed. 2d 458; *Bergjans Farm Dairy Co.* v. *Sanitary Milk Producers,* (D.C. E.D. Mo., 1965) 1965 C.C.H. Trade Cases, para. 71,466; *Hartford-Empire Co.* v. *United States,* (1945) 323 U.S. 386, 89 L. Ed. 322.

The only reference to the record is to "R. 1, 92, 380" in one footnote (Br. 16)[10] and to "R. 108" in another footnote (Br. 19).[11]

It is quite astounding to read appellees' contention that a mere reading of the complaints is sufficient to show if the plaintiff has a claim or if summary judgment lies. If this were the case, it would expedite and enhance efficiency in Federal litigation, although, we suggest, at the expense of the fairness and justice.

Appellees cite 20 cases as "authority" in this particular portion of the argument. None relates to the record and the transcript.

The references to the transcript which do appear in this portion of the argument are limited to the self-serving declarations of Mr. McMinimee, one of the appellees, Mr. Cadonau, an officer of Alpenrose Dairy, Inc., an alleged co-conspirator,[12] a reference to the trial judge's discussion with counsel,[13] as well as references to statements of counsel[14] which are taken out of context and thus distorted.

Appellees argue that appellant relied on *Poller* v. *Columbia Broadcasting System,* supra, "as barring summary judgment in antitrust cases" (Br. 17), referring to appellant's opening brief, pp. 25-27, 34, 35.

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[10] R. 1 refers to the original complaint, R. 92 identifies the first amended complaint, R. 380 the second amended complaint.

[11] R. 108 is the appellees' motion for summary judgment relative to the first amended complaint.

[12] Note 54, Br. 19.

[13] Note 53, Br. 19.

[14] Note 56 and 57, Br. 20.

Appellees distort our position by ascribing to us the sort of wishful oversimplification which marks appellees' brief. We cannot and did not assert the *Poller* case, or indeed any case, as *barring* summary judgment in antitrust cases.

No such sweeping authority is available to us.

We did contend, however, and so *Poller* holds, that the advisability of summary judgment in antitrust cases is limited, and we contend that in the light of this admonition, summary judgment was not proper and advisable in the case at bar; it should be reversed.

One case cited by appellees in support of their position[15] is discussed in the last footnote of appellees' brief (Br. 22, Note 58). Appellees quote an excerpt from that decision which distinguishes *Poller* because, so the court states, in *U. S.* v. *Johns-Manville,* the plaintiff (the Government) relied chiefly on the allegations in its pleadings, and the record consisted of testimony given by witnesses during an earlier criminal trial lasting over four months, who were cross-examined and had their demeanor appraised by the trial judge.

Appellees then argue:

> "In the present situation, two of the defendants, TCCA and TC & DA, have recently been involved in a trial before the same judge. In that trial, which involved ownership and use of a trademark, the relationships between the parties was developed in

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[15] *United States* v. *Johns-Manville Corp.* (E.D. Pa. 1964) 237 F. Supp. 885.

the record. The earlier case is reported at 143 USPQ 12." (Br. 22)[16]

We reply: Nonsense.

1. In *Johns-Manville,* the previous criminal trial related to the same facts as the later civil antitrust case. Not so in the case at bar.

2. In that criminal trial, the case was resolved against the Government and for the defendant, Johns-Manville Corp. In the present case, the preceding trademark case was resolved in favor of TC & DA, the appellant here, and against TCCA, an appellee, not only by the trial court, but by this court on appeal; if there is weight to be given to implications arising out of prior litigation between the parties, we would call the court's attention not only to the results of that case,[17] but to specific findings of the trial court which withstood the test of appeal. The trial court's memorandum decision in that case is found in this record (R. 13-38) as was noted in the opening brief (Op. Br. 4).

CONCLUSION

Appellees chide us by suggesting this case be, in effect, thrown in the ash can on the basis of a mere reading of the complaints because:

"This case is just another expression of the bit-

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[16] Appellees mistakenly refer to TC & DA as a defendant here; TC & DA is the plaintiff-appellant, —the "we" in this brief. TCCA is one of the defendants-appellees.

[17] Reported not only in the USPQ (as cited in Br. 22, Note 58, though not listed under "authorities" Br. ii-iii), but also at 345 F.2d 158 (*Tillamook County Creamery Association* v. *Tillamook Cheese & Dairy Association,* 9 Cir. 1965).

ter acrimony existing between the parties which has manifested itself in a series of lawsuits on various issues in the state and federal courts.

"Appellant is an admitted newcomer in the marketing of dairy products and has suffered the problems and frustrations of anyone launching itself into a highly competitive market with no prior experience. Appellant seeks to blame appellees for all its problems and to cloak its mistakes and failures as part of a sinister plot on the part of appellees to destroy appellant's business." (Br. 16)

True, the parties have been engaged in a series of lawsuits in various courts. Regrettable as this is, it is no justification for summary judgment.

Appellant was a newcomer in the marketing of dairy products, since in the marketing field, appellant TCCA has previously been appellant's agent. Appellant has suffered frustrations and indeed substantial damages, and by this suit seeks to establish that, in large measure, these damages may be laid at the door of the appellees.

"A precious part of our freedom is the freedom to enter a market, the freedom to win a place there through strenuous competitive effort, the freedom to buy and sell without restraints imposed by others. It is these freedoms that the antitrust laws protect."[18]

The appellant is fighting to secure its economic freedom in the market place, to secure its freedom to buy

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[18] Earl W. Kintner, former Chairman and General Counsel of the Federal Trade Commission, Prologue to *An Antitrust Primer,* at Page xiv (The Macmillan Company, 1964).

and sell without restraints appellant claims have been imposed by the appellees to its damage.

This freedom of appellant can only be protected and effectively secured by a resolution of the questions here raised upon a full trial.

In this reply brief, as in our opening brief, we respectfully ask that the summary judgments be reversed and the cause be remanded for trial.

Dated: October 19, 1965.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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